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No. 91-2063

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COMMODITIES EXPORT CO.,

Petitioner,

V

U.S. CUSTOMS SERVICE,

Respondent,

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Reply to Government's Opposition Brief

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NOTE

References to the documents filed in the Supreme Court are in date order as follows: Commodities' Petition for Writ of Certiorari ("C") and the Appendix incorporated therein ("A"); the Opinion of the Trial Court, i.e., the federal district court in Detroit ("D"); the Government's Brief in Opposition ("GB") and the Appendix incorporated therein ("GA"), followed by the page number(s). Thus, "A1-19" refers to pages 1 through 19 of the Appendix incorporated in Commodities' Petition for Writ of Certiorari.

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I. The Government (as the Sixth Circuit [A1-19]) fails to recognize that the subject matter jurisdiction of the Court of International Trade ("CIT") is *party specific* and erroneously implies that a finding of CIT jurisdiction under 28 USC 1582(2), where *only* the Government can be the plaintiff, means that there is CIT jurisdiction in this case where Commodities is the plaintiff.

This action was first filed in the federal district court in Detroit on March 29, 1988 (A25) - *nearly one full year before any Commodities cases were filed in the CIT!* (C4-7.) Both the Detroit district court (the trial court in this case) and the Sixth Circuit had a duty *in the first instance* to determine whether or not the Detroit district court had jurisdiction.

The Detroit district court dismissed Commodities' First Amended Petition for Supplemental Relief ruling that Customs had not violated its injunction so as to give it jurisdiction and that the CIT had jurisdiction over Customs' pending bond liquidated damages claims under 28 USC 1582(2) pursuant to its ruling in *US v Commodities Export Co*, 733 F Supp 109 (CIT 1990) (D1-16, A39-52).

The Sixth Circuit vacated the Detroit district court's ruling and instructed it to transfer this case to the CIT. The Sixth Circuit accorded *res judicata* to the CIT's above ruling in *Commodities*. (A1-19.)

At no time did either the Detroit district court or the Sixth Circuit address the issue of whether or not federal district courts had subject matter jurisdiction under 28 USC 1352 and 28 USC 1355 over Customs bond liquidated damages claims where a party other than the Government was the plaintiff, although Commodities specifically raised that issue before both courts. (D9, A6-7, see discussion C7-11.)

The two principal statutes governing CIT jurisdiction are 28 USC 1581 and 28 USC 1582. Under 1582 only the Government can be plaintiff whereas under 1581 only a non-Government party can be plaintiff.[1] 1581 and 1582 are completely different. (A64-67.) *1582 jurisdiction does not constitute 1581 jurisdiction and vice versa because these statutes are (1) party specific and (2) encompass different subject matter!* The Sixth Circuit (A1-19), the Detroit district court (D1-16),

[1]28 USC 1582 is an exception to jurisdiction under 28 USC 1352 and 28 USC 1355 but 28 USC 1581 is not. Therefore, where a non-Government party is plaintiff, 28 USC 1352 and 28 USC 1355 can confer jurisdiction over bond liquidated damages claims on the federal district courts.

and the Government's Brief have assumed the opposite.[2]

Up to this case, the Government's position was that non-Government parties could obtain access to the CIT over bond liquidated damages by filing a protest under 28 USC 1581(a). See C11-14. The Government has apparently abandoned this position since it is nowhere expressed in its Brief. Instead, the Government has argued (GB6 n 5):

> The facts in this case are quite different, and may fall within Section 1581(i)'s [28 USC 1581(i)] specific grant of jurisdiction over suits arising from the substance, administration or enforcement of federal laws concerning *revenue from imports*.... (Emphasis added, see also GB8 n's 7, 9 and for text of 1581(i) see C3 and for complete text of 1581 and 1582 see A64-67.)

In its Statement, the Government described bond liquidated damages as (GB3):

> 2. a. Petitioner (like other duty-free sales enterprises) operates under a warehouse bond intended to secure compliance with regulations of the United States Customs Service (Customs) pertaining to storage and marking of merchandise, as well as certain recordkeeping procedures. See 19 U.S.C.

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[2]The Government's claim (GB8 n 8): "If the action is cognizable at all, it may be that the propriety of the CIT as the forum for this particular case has been settled, as law of the case, by the Sixth Circuit's decision...."; is preposterous. This decision was based entirely on 28 USC 1582(2) where *only the Government can and must be the plaintiff*. Commodities is the plaintiff in this case. It can never be the plaintiff in the CIT in an action brought pursuant to 28 USC 1582(2). A transfer to the CIT from the Detroit district court as ordered by the Sixth Circuit under 28 USC 1631 does not permit any court to rearrange the parties so that the Government will now be the plaintiff and Commodities the defendant so that the posture of the case will be transformed into that of a 28 USC 1582(2) case. The latter implicit suggestion is even more preposterous than the first.

1555, 1623; Pet. App. A23. *Customs is authorized to assess liquidated damages, payment of which is secured by the bond, in response to infractions by the store operator....* (Emphasis added.)

"Infractions by the store operator" is not "revenue from imports." Moreover, it is clear from this Government description that bond liquidated damages are designed to penalize the store operator. Bond liquidated damages are defined as penalties under 19 USC 1623(b)(1) and 19 CFR 113.2(a).[3] See C7-10.

In this case, Commodities is the plaintiff. It does not require a transfer to the CIT to see that the CIT has no jurisdiction over this case under 28 USC 1581, nor in particular under 28 USC 1581(i).

It is also clear that the task of ruling on the federal district court's jurisdiction has been improperly delegated to the CIT rather than to the Detroit district court and the Sixth Circuit which should have ruled on it *in the first instance*.[4]

II. There are two views of this case: (1) it is Customs' attempt to put Commodities out of business by using the bond liquidated damages assessments as a pretext; (2) it is Commodities' attempt to obtain judicial

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[3] The United States Court of Appeals for the Federal Circuit in *US v Commodities Export Co*, consolidated Case No.'s 91-1470 & 91-1482, disagreed in its ruling of August 11, 1992 without addressing this authority which was explicitly raised by Commodities. (GA8a.)

[4] The Detroit district court took no testimony but simply accepted a totally self-serving affidavit of the local district director of Customs as dispositive of the issue of the threat by Customs to put Commodities out of business. (D1-16.) Moreover, neither the Detroit district court nor the Sixth Circuit reviewed the applicability of 28 USC 1352 and 28 USC 1355 to this case. *Supra*, p 2.

review of bond liquidated damages assessments. In either, *since Commodities is the plaintiff,* the federal district courts have jurisdiction.

This case is based on Commodities' Petition for Supplemental Relief (now Amended), first filed in the Detroit district court, which in turn is based on the injunctions entered by the Detroit district court to preserve Commodities' status quo as a duty-free store making deliveries of tax- and duty-free goods *before* the border exit point. (C5-6.)

Shortly *after* Commodities opened for business on July 14, 1976, Customs changed its policy and required all duty-free stores to deliver tax- and duty-free goods at or beyond the border exit point.[5] The Detroit district court injunctions were a result of Customs' attempt to force Commodities to comply with its new policy or go out of business. (C5-7, GB3 n 2.)

The filing of Commodities' Petition for Supplemental Relief on March 29, 1988 was precipitated by Customs' threat: pay the bond liquidated damages within 30 days or go out of business.[6] There was to be no hearing of any kind. (C5-7.)

To date, Commodities has had no evidentiary hearing or trial on the merits concerning this threat.[7] See A20-38, D1-16. Viewed in this light, i.e., that the bond liquidated

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[5]Codified at 19 USC 1555(b)(3)(F)(ii). See A61.

[6]Euphemistically referred to by the Government as "administrative actions." (GB3, 8.)

[7]At trial, the CIT barred Commodities from presenting evidence on this threat which was explicitly raised in Commodities' Answer as an Affirmative Defense. Commodities raised this threat again on appeal to the Federal Circuit which ignored it. (GA1a-13a.)

damages assessments are merely a pretext or subterfuge to put Commodities out of business, there can be no question that the Detroit district court would have jurisdiction as the Sixth Circuit noted in its first opinion (A32):

> 1. *Continuing jurisdiction over previous orders of the District Court.* Commodities argues that the motions underlying this appeal are predicated on its allegation that, throughout the challenged course of conduct, Customs sought to ruin Commodities' business by bringing meritless or inflated assessments for liquidated damages in violation of the due process clause, and thus to evade the District Court's earlier order compelling it to allow Commodities to run a duty-free shop. Commodities' vice-president, also its general counsel, swore to these allegations in the petition for supplemental relief. The District Court therefore had before it proof of an evasion of a valid and binding court order, if the Court had found that this allegation was true, jurisdiction would arise from its own continuing jurisdiction, over the original dispute. We conclude that it was not enough for the District Court to reject the argument that the injunction sought here is supplemental to its prior orders without addressing these factual allegations in Commodities' petition. JA 182 n.5. We therefore remand this issue for factfinding and a ruling.

The CIT has no jurisdiction to rule on another court's injunctions.

Viewed strictly as Commodities' attempt to obtain judicial review of bond liquidated damages assessments, again the Detroit district court would have jurisdiction under 28 USC 1352 and 28 USC 1355. Since Commodities is the plaintiff, the CIT has jurisdiction under neither 28 USC 1581 in general nor 28 USC 1581(i) in particular. See, *supra*, I. and C7-14.

The Government argues (GB8-9) that if there in no jurisdiction in the CIT, then Commodities should wait to be sued by the Government in the CIT under 28 USC 1582(2).

This misses the point of this case which is that Commodities has a Constitutional due process right to equal access to a judicial forum *in its own right*.[8] This point was clearly grasped by the Sixth Circuit in its first opinion (A32-35) and even by the Federal Circuit (GA11a n 3).[9]

In the CIT and the Federal Circuit, the Government maintained that this case was different from the CIT case. See A45. In the Supreme Court (GB6-7), the Sixth Circuit (A1-19), and the Detroit district court (D1-16), it maintained that they were the same to support the concept of *res judicata*. A finding of *res judicata* based solely on 28 USC 1582(2) is limited to just that: a case in which the Government is the plaintiff. It is not extendable to the whole gamut of CIT jurisdiction.

III. On August 11, 1992 the Federal Circuit upheld the CIT's jurisdictional ruling in *Commodities, supra.* (GA1a-13a.) Commodities respectfully disagrees because that decision fails either to analyze or recognize how duty-free stores actually operate which is exclusively in *export.*

Duty-free stores temporarily store both domestic and

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[8]Had Commodities not filed its Petition for Supplemental Relief in the Detroit district court on March 29, 1988, it would have been forced out of business by Customs in 1988.

[9]The Federal Circuit stated (GA11a n 3):

> The Supreme Court has referred in dicta to 28 U.S.C. § 2415 as "a statute aimed at equalizing the litigative opportunities between the Government and private parties." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 521 (1967). The Supreme Court noted that "[t]he congressional intent to 'put the Government on a parity with those private litigants who may sue' and 'to equalize the position of litigants' is sufficiently evident." *Id.* at 521 n.14 (citations omitted)....

foreign goods in their bonded warehouses pending their immediate exportation from the United States in the possession of travelers departing the United States who buy the goods from the duty-free store.

The foregoing is a constant in the duty-free industry which represents the whole "transaction" which must be examined for purposes of determining "import transaction" under 28 USC 1582(2). See A67. The Federal Circuit only examined the first half (GA5a-7a) which in essence holds that foreign goods are imported into the United States the instant they cross the border.[10]

On December 17, 1931, in *Stone & Downer et al v US*, 19 CCPA 259, 264 (1931), *cert. den.*, 287 US 619 (1932), the United States Court of Customs and Patent Appeals stated a fundamental principle of law specifically applicable to Customs bonded warehouses, to wit: there is no importation until the goods are withdrawn and injected into the US stream of commerce. See C15. The Federal Circuit (GA6a) erroneously restricted *Stone* to "the timing of duty assess-

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[10]This is simply untrue: A Danish tourist arrives at Dulles International Airport with a new Nikon camera purchased in Copenhagen to take snapshots of his two week vacation in the US after which he will return to Denmark with his pictures and Nikon. Is the Nikon imported?

A train loaded with Canadian goods goes from Toronto to Mexico City via the US. Are the Canadian goods imported?

The zoo in Toledo, Ohio, hosts a panda bear exhibit during the summer for which it charges admission after which the pandas are returned to China. Were the pandas imported?

A foreign museum sends its art works on a tour of the United States after which the art is returned to the foreign museum. Were the art works imported?

The answer to all of these questions is "No."

ments." There is no support in *Stone* for this restriction. Indeed, not even the CIT took this position. See A47-48.

The Federal Circuit conducted no factual analysis of the workings of duty-free stores as it was specifically asked to do. Instead, it accepted the words "importation" and "imported" as used in 19 USC 1557(a) and 19 USC 1555(a), respectively, as dispositive of the issue of whether or not goods in bonded warehouses are "imported" without asking "Why." See GA5a. Apparently, this means that the Jack Daniels in Commodities' bonded warehouse is also "imported." The Federal Circuit also did not note that 19 USC 1555(a) is subject to 19 USC 1555(b), the only statute that specifically deals with duty-free sales enterprises and which says nothing about "importation" but rather emphasizes the export nature of duty-free stores. See A58-63. Moreover, the language on which the Federal Circuit relied in 19 USC 1555(a) and 19 USC 1557(a) went into effect on June 17, 1930 - a year and a half before *Stone* and some thirty years before the first duty-free store appeared on the American scene. At that time all Customs bonded warehouses were used to expedite and facilitate the importation of goods into the United States, i.e., the injection of foreign goods into the American stream of commerce.

Based on the faulty premise that the goods in Commodities' bonded warehouse are "imported," the Federal Circuit ruled that Commodities' bond relates to "the importation of merchandise" as required by 28 USC 1582(2) because (1) "the bond's terms deal with Commodities' documentation and manipulation of imported merchandise in its warehouse" and (2) "the bond also ensures payment of duties on imported merchandise in the event those duties become payable." See GA7a. Commodities' bond says nothing about "importation" as the CIT duly noted (A51). Lastly, the Federal Circuit did not recognize that all the liquor in Commodities' warehouse is subject to 26 USC 5214(a)(9) which mandates storage for

export only under bonds prescribed by the Secretary of the Treasury.

IV. The Supreme Court has not defined "importation," "imported," or "import transaction." It may now be necessary to do so. The Cold War is over. The United States is now in an economic war: it is about to implement a number of trade agreements. In one form or another these terms will continue to return to this Court.

CONCLUSION

Commodities' Petition for Writ of Certiorari should be granted.

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